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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1315.

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND TO MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

STATEMENT OF THE CASE.

PROCEEDINGS BELOW.

Petitioner Nevius was the prosecuting attorney of Clark county, Ohio (R., 172). He was indicted by the Clark county grand jury jointly with Joseph Parisi and Ralph Schear, alias "Cookie" Schear, for accepting bribes

from Parisi and Schear who were the proprietors of a gambling house (The Silver Dollar) theretofore operated in Clark county (R., 1, 28, 172). A severance was ordered and Nevius was tried alone (R., 46, 172).

As stated in the opinion of the Supreme Court of Ohio,

> "The jury had before it evidence to sustain the conclusions:
>
> "(1) That Nevius, the prosecuting attorney, not only knew Parisi, Schear and Thomas, but was on good terms with them, especially Parisi.
>
> "(2) That Nevius knew that Parisi, Schear and Thomas were gamblers who were openly conducting the gambling house known as the Silver Dollar.
>
> "(3) That the Silver Dollar gambling house was located in Clark county.
>
> "(4) That Nevius, the prosecuting attorney of Clark county, made no attempt to suppress the open gambling conducted at the Silver Dollar.
>
> "(5) That Nevius visited the Silver Dollar two or three times a month for a period of more than a year. Parisi, Schear or Thomas was usually at the Silver Dollar at the time of such visits.
>
> "(6) That Nevius lived beyond his means and had excess expenditures over his income of more than $12,000 during the period from January 1, 1941, to June 30, 1944.
>
> "(7) That the money for such excess expenditures came from Parisi and/or Schear and was accepted by Nevius to influence him with respect to his official duties as prosecuting attorney of Clark county.
>
> "(8) That the acceptance of such money took place in Clark county, Ohio" (R., 180, 181).

It is to be noted that this gambling enterprise yielded annual revenues of nearly a million dollars for each of the years 1941 to 1944, inclusive (R., 465-466).

The first, third and fifth counts in the indictment charged Parisi and Schear with giving the bribes, while the second, fourth and sixth counts charged Nevius with accepting bribes (R., 1, 28, 172). The second and fourth counts charged him with accepting automobiles and the sixth count charged him with accepting large sums of money, all with the intent to influence him with respect to his official duty as the duly elected, qualified and acting prosecuting attorney of Clark county, Ohio (R., 1, 28, 173).

The jury found Nevius guilty of bribery on all three counts, that is, the second, fourth and sixth counts of the indictment (R., 80, 173).

Petitioner took his case to the Court of Appeals which ordered him discharged and dismissed on the second and sixth counts of the indictment and remanded the cause for new trial on the fourth count (R., 137, 173). From this judgment of the Court of Appeals the state took the case to the Supreme Court of Ohio which reversed the Court of Appeals and affirmed the trial court as to the sixth count (the money count) but discharged the defendant on the other counts, on the second count for want of proof and on the fourth count for lack of venue, the evidence indicating that the automobile referred to in that count as given to Nevius by Parisi was delivered to him in a county other than Clark county (R., 175, 194, 195). As stated in the opinion, the court would have been justified under the evidence to have committed him to await a warrant for his arrest in such other county (R., 176, Section 13442-6, General Code of Ohio).

Petitioner filed in the Supreme Court of Ohio an application for rehearing (R., 192) which was denied (R., 168). Thereafter petitioner filed in this court his petition for a writ of certiorari and a typewritten transcript of the records and proceedings in the courts below. With his petition for a writ of certiorari he filed a motion to dispense with the printing of the record.

THE QUESTIONS RAISED.

The brief of petitioner carries (pp. 23-26) his "Specification of Errors" and these present two questions. Specifications 1(a), 1(b) and 4 have to do with the alleged exclusion of certain racial and religious groups from the jury, and the remaining specifications relate to the subject of alleged bias and prejudice of the trial judge. These two questions are referred to in the petition (p. 19) as the two main questions presented here. We believe they comprise the only questions presented.

FACTS AS TO JURY SELECTION.

We confine ourselves to the record. At the same time, as a duty to this court and to the state of Ohio, we find it necessary to point out some of the matters wherein petitioner strays from the record.

We take up first the record showing on the subject of jury selection.

The statutory procedure presented in the General Code of Ohio was strictly followed by the trial judge:

> "Sec. 11419-46. Talesmen summoned, when. When, by reason of challenge or other cause, enough jurors summoned as aforesaid to make up

the panel, either of the grand or petit jury, are not present, or if the array be set aside, the sheriff shall summon talesmen until the deficiency is made up, or, if the number for a grand jury is insufficient, the court may issue a special venire to the sheriff, commanding him to summon the persons named therein, to attend forthwith, as grand jurors.

"Sec. 11419-48. Selection of talesmen on motion of either party.

When it is necessary to summon talesmen, the court, on the motion of either party, shall select them, and cause to be issued immediately a venire for as many persons having the qualifications of a juror as, in the opinion of the court, may be necessary, which persons shall be required to appear forthwith, or at such times as may be fixed by the court; but no person known to be in or about the court house shall be selected without the consent of both parties."

When it appeared, from time to time, that it would be necessary to summon additional talesmen in order to complete the panel, the state, on motion, exercised its statutory right to require the trial judge to select them (Section 11419-48, supra, R., 57, 62, 66).

Before exhausting his peremptory challenges the petitioner waived examination of any specific juror for cause and, reserving no exceptions, unqualifiedly accepted the jury as satisfactory to him. We quote from the record (R., 210-211):

"By the Court: Is there any further examination for cause at this time?

Mr. Corry: The state accepts the jury.

Mr. Herbert: The defense is satisfied with the jury.

By the Court: So that there will be no misunderstanding, the state passes any further examination

for cause of any specific juror or the whole panel, and any additional peremptory challenge? And the defense passes any further examination of any specific juror for cause?

Mr. Herbert: Yes.

By the Court: And the defense accepts the jury, and passes the exercise of their remaining peremptory challenge?

Mr. Herbert: The defense is satisfied with the jury.

By the Court: Is there any reason known to either side why the jury as now seated should not be sworn in this case?

Mr. Herbert: No reason.

Mr. Corry: We have no reason.

By the Court: Is there any juror seated in the jury box who has not been a resident of the state of Ohio for one year?

(No answer.)

By the Court: Is there any juror in the jury box who is not a resident of Clark county, Ohio?

(No answer.)

By the Court: Is there any juror who is not at least twenty-one years of age?

(No answer.)

By the Court: The clerk will now swear the jury as impaneled.

Jury sworn."

After the jury found petitioner guilty he then, for the first time, complained of the manner in which the jury was constituted. This he did by filing, at the time of hearing of his motion for a new trial, his own affidavit, to which he had attached numerous reports obtained by him from a local credit bureau, having reference to the race, religion and other characteristics of the jurors

summoned for service (R., 89-90). His affidavit was as follows:

"Jerome A. Nevius, being first sworn, deposes and says that the documents hereto attached are reports furnished in the usual course of business by the Retail Credit Bureau of the city of Springfield, Ohio after investigation of those called for jury service in the trial of Jerome A. Nevius in the above entitled action.

"Affiant further says that the first forty-four (44) of said reports are on those citizens of Clark county, Ohio, who were summoned through the jury wheel and that the balance of said reports are on those citizens of Clark county, Ohio, who were summoned by order of the judge of the Court of Common Pleas of Clark county, Ohio, thereafter.

"Affiant says that all of said jurors not summoned by operation of the jury wheel are native born citizens, members of the Caucasian race, from which groups members of two minority religious groups, to wit, Catholic and Hebrew, have been excluded, and that said exclusion affects approximately fifteen percent (15%) of the population of the said Clark county, Ohio, and that the exclusion of races other than the Caucasian race excludes from such jury service approximately an additional fifteen percent (15%) of the citizens of said Clark county, Ohio."

The state moved to strike from the files this affidavit with its attached credit bureau reports upon jurors summoned for service (R., 103). The grounds of the motion were:

"(1) Said affidavit and reports attached thereto are immaterial, irrelevant and scurrilous.

"(2) The reports attached to said affidavit are based solely upon hearsay information and are incompetent evidence to support the motion for a new trial.

"(3) Neither the defendant nor the plaintiff interrogated or challenged the jurors with respect to their race or religion, nor did the defendant challenge the array, nor exercise all of his peremptory challenges, and the defendant accepted said jury without reservation.

"(4) The defendant and his counsel were furnished with the reports of the Retail Credit Bureau of the city of Springfield, Ohio prior to their examination of the qualification of jurors and prior to their acceptance of the jury and the presentation of the reports in connection with said affidavit filed in support of the motion for a new trial does not constitute newly discovered evidence and the defendant is estopped from questioning on the motion for a new trial, the qualification of said jurors.

"(5) Other grounds appearing upon the face of the record."

Petitioner says (Petition, p. 11) that this affidavit and the reports proffered with it were tendered following this court's opinion in **Glasser v. U. S.**, 315 U. S., 60, but in that case, to which we shall hereafter refer, the opinion of the court was that the affidavit of the defendant alone, alleging the improper constitution of a jury, even though uncontroverted, is not enough.

The motion to strike was, except as to striking the affidavit itself, sustained (R., 104).

The motion for a new trial and in arrest of judgment was also overruled (R., 104). The opinion of the trial court on this motion is so well considered, especially in relation to this subject of the jury selection, that we attach it hereto as "Appendix A". We note particularly his statement that:

"The court does not know at this moment and never has known the racial lineage or religious faith

> of any members of this jury, or any other jury which has served in this court. Such matters are never inquired about by either the attorneys or the court in examining jurors, and in no jury trial in which Mr. Nevius took part has the court ever heard him make such an inquiry."

The petitioner, however, was possessed of the credit bureau reports and in his petition he volunteers the information that among the last twenty-two names drawn from the jury wheel there were five Catholics and one Negro (Petition, p. 11).

It is to be noted in passing that the record, and even the affidavit of petitioner heretofore set forth, failed to show that the petitioner falls in either of the excluded classes of race or religion referred to in his affidavit. Nor does the record show that the question of race or religion entered into the case in any manner until injected by petitioner in connection with his motion for a new trial.

Nothing is found in the record to support the allegations of petitioner (Petition, p. 11) that he is a Catholic, very active in his church, that years ago in Clark county strong feeling was aroused against members of the Catholic faith and other minorities and the colored race, and that this feeling is still present. The inclusion of the foregoing material in the petition is an inexcusable effort on the part of the petitioner to supply, **dehors** the record, a significant deficiency therein.

This matter of racial and religious discrimination was not made one of the assignments of error by the petitioner in taking his case to the Court of Appeals (R., 123). There was, however, an attempt to again revive

it in the application of the petitioner for a rehearing after the Supreme Court of Ohio had rendered its decision and on this application for rehearing it was, for the first time, expressly claimed as a deprivation of the rights of the petitioner under the provisions of various amendments to the Constitution of the United States (R., 196).

The application for rehearing was denied (R., 168) and this closed the record in the state courts as to the complaint of jury discrimination, which record was in fact closed by the petitioner himself when, with full possession of information received from private sources as to the qualifications of the jurors, he accepted the jury without reservation.

FACTS AS TO THE ALLEGED BIAS AND PREJUDICE OF THE TRIAL JUDGE.

In his "Specifications of errors" (Petition, pp. 23-26) the petitioner not only claimed bias and prejudice on the part of the trial judge in the jury selection (the facts relating to same being hereinbefore set forth) but also claimed that his conduct and rulings indicated bias and prejudice. The facts involved are set forth below in the same order in which they appear in the "Specifications of errors".

Specification 1(c)—Bias is claimed to be shown by the refusal of the trial judge to order the prosecution to furnish petitioner with a bill of particulars, especially respecting the money count (Petition, pp. 24, 8). A bill of particulars was furnished showing the state expected to prove money bribes of approximately $7,500.00 (R.,

37). Furthermore, there was furnished to the petitioner and his counsel all books, documents and papers, instruments of writing of any kind and all types whatsoever, which the state expected to use as a part of its case or as a basis of its evidence in the trial, in so far as any such material was in the possession of counsel for the state or under their control, or otherwise available to them, and permitted the defendant and his counsel to make copies of same (R., 102).

In the same specification the petitioner also claimed bias in that there was no charge of conspiracy alleged in the indictment, although the element of conspiracy was introduced in evidence. In Ohio there is no criminal offense of conspiracy. In the case at bar the question of conspiracy was only pertinent as a rule of evidence (R., 185-185(A)).

Specification 1(d)—Bias is claimed in that the trial judge refused to grant a hearing to the petitioner before finding that he was under disability which precluded him from performing his official duties (Petition, p. 25). The question of the determination of the disability of the prosecutor was a ground set forth in the plea in abatement (R., 19). The state filed a reply to the plea (R., 22-29). The plea in abatement was heard before Judge Richard L. Cameron, common pleas judge of Union county, Ohio, and not heard by the trial judge. The petitioner's contention was found to be without merit (R., 36).

Specification 1(e)—Bias is claimed in that the trial judge had conferences with attorneys for the prosecution and secured two members of the highway patrol to

interview witnesses. The members of the highway patrol were assigned to the prosecution by Frank L. Lausche, governor of the state of Ohio, and they were directed to report, not to the trial judge, but to Mr. Leis, who was conducting the grand jury investigation and the prosecution of this and other cases of corruption in Clark county (R., 906, 19, 22-29).

With references to conferences with attorneys all that is shown is that Mr. Leis kept some papers in the office of the judge until a room was available for him (R., 919).

In the same specifications of errors reference is made to the trial judge conducting hearings wherein witnesses were sworn to give testimony against the petitioner after the indictment was returned and without notice to the petitioner. Apparently there was only one such instance, that of Rupert Wissinger, who was so subpoenaed and examined (R., 897). The trial judge did not know the subpoena was going to be issued, nor did he conduct the hearing, nor was he given any information as to who the witness was nor the purpose of the examination, but was merely informed by Mr. Leis that the witness would be examined in the manner provided by law (R., 901-903).

The grand jury was still in session but apparently was not available on that particular day (R., 901). The witness was again called at the time of trial and the petitioner was afforded full opportunity to cross examine and did cross examine the witness. The witness was called merely to produce records giving information that was already in the possession of the petitioner, being the loan account of himself and his wife (R., 899), which record was introduced at the trial and testimony taken upon both direct and cross examination.

Specification 1(f)—Bias is claimed to be shown by the fact that petitioner's motion for severance filed on January 25, 1945, was not passed upon until the day of commencement of trial, thereby denying petitioner reasonable opportunity to prepare his defense (R., 21, 46, 47). No exception was taken to the delay nor was any application made for a continuance. This consent of the court to a severance was a most conspicuous evidence of fairness, if not even of favoritism, of the trial judge toward the petitioner.

Specification 2—This specification carries the wholly unfounded allegation that it was established at the hearing upon the affidavit of prejudice that the trial judge had a financial interest in securing a conviction of the petitioner and that the trial judge was an important participant in a gambling syndicate and feared a grand jury investigation (Petition, p. 26). The trial judge stated at the hearing before the chief justice of the Supreme Court of Ohio that he was a stockholder and an officer in a theater company, a half-interest in which was owned by two other companies, one of which was Warner Brothers of New York (R., 907-908). He further stated that the general manager of the company in which he was a stockholder was, by virtue of its regulations, under the supervision and control of Warner Brothers (R., 910-911). The trial judge stated that he had at times seen in front on the marquee a reference to a feature of the program referred to as "Bank Night", the character of which feature was not in any manner disclosed by the record (R., 908-910).

In related connections but at other places in the petition we find such other most reckless departures from

the record as those comprising the following allegations; that "the trial judge himself admitted that he had a pecuniary interest in the outcome of the trial"; that he was an officer in a corporation "which maintained and carried on a highly lucrative gambling lottery"; that in this lottery "the trial court was active"; that its suppression "would further have resulted in substantial pecuniary loss to the trial judge" (Petition, p. 5).

These unfounded inferences were justly criticized by the chief justice of the Supreme Court when upon finding that the affidavit of petition that the contention of bias and prejudice was without foundation he stated that in cases of this sort much feeling is engendered and it is easy for the parties themselves, as well as their counsel, to draw inferences that later their more sober judgment would indicate were probably without foundation (R., 958). In concluding the hearing the chief justice stated:

> "I say to Mr. Nevius, and all of counsel, that in my judgment that this evidence here today falls far short of being the substance that is necessary to unbench a judge. Of course, all of us agree that it is important for every litigant in a civil or criminal case, to have a fair and impartial hearing. It has been said that it is not enough for a litigant to simply have that impression when he doesn't have a sufficient basis in fact. It should be remembered, too, by the prosecutor here, that this case to be tried is not a case in which this judge will sit as a decider or a judge of the facts, those require submission to the jury, and surely the prosecutor will remember that the questions of law upon which the judge will rule, as well as the admissibility of the evidence, are questions that can be reviewed, not only by the

Court of Appeals, but by this court. And for whatever satisfaction it may bring to Mr. Nevius and his counsel, I have no hesitancy in saying to them, that in overruling this affidavit of bias and prejudice here today, I am in no wise indicating what my attitude as one of the seven members of this court should be, if there should be a conviction and this case should come here for review. The questions of law that necessarily would be raised in a record of that kind are something that are entirely different from the determination of the facts on the question of bias and prejudice for determination here today" (R., 959-960).

Each complaint made in the specifications of errors related to rulings of the trial judge which were carried to the Supreme Court of Ohio, and the rulings of the trial judge were in each instance affirmed by the Supreme Court of Ohio. To say now that correct rulings of the trial judge and of the chief justice himself on the affidavits of prejudice constitute a showing of bias and prejudice on the part of the trial judge would be to transfer that same charge of bias and prejudice to the chief justice and to the members of the Supreme Court of Ohio.

ARGUMENT.

The Jury Question.

There is nothing at all in the record relative to the race or religion of any juror. The foregoing statement presumes that there had properly been stricken from the record the hearsay reports of a local credit bureau relative to jurors, which reports were attached to the affidavit of the petitioner filed on the hearing of the motion for a new trial.

The hearsay character of these reports, obtained from undisclosed sources, is fully discussed in the opinion of the trial judge rendered upon his overruling of the motion for a new trial, which opinion is set forth fully in "Appendix A", hereto attached.

In the case of **Glasser v. United States**, 315 U. S., 60, this court has held that on a motion for a new trial a claim of discrimination in the manner of selecting the jury is not sufficiently supported by an affidavit of the one convicted. In that case, after trial, and on a motion for a new trial, Glasser set forth his affidavit that all the names of women placed in the box from which the panel was drawn were taken from a list furnished the clerk of the court by the Illinois League of Women Voters, and that others were systematically excluded, by reason of which he did not have a trial by a jury free from bias. The source of his information was stated to be a then current article in the American Bar Association Journal. In the opinion in this case it was stated that on the record the petitioner's showing was insuffi-

cient; that it was incumbent on the moving party to introduce, or to offer, distinct evidence in support of the motion; that the formal affidavit alone, even though uncontroverted, is not enough; that the record was barren of any actual tender of proof or proof that the court refused to entertain any such offer, and that this failure of petitioner was fatal.

If this motion had not been overruled, and if the reports made by the credit bureau relative to the religious faith of each person named in the three special venires which the trial judge issued from time to time as more names were found to be needed to fill the jury, had not been stricken from the file, still nothing appears in the record to indicate any systematic, intentional or deliberate effort to manipulate the jury. The first forty-four jurors were regularly drawn from the wheel and the remaining fifty-five jurors included in the three special venires were selected by the judge on motion of counsel for the state, made under the provisions of Section 11419-48, General Code of Ohio, heretofore set forth in our statement of the case. It was not within the discretion of the judge to refuse to himself summon talesmen upon motion by either party.

McHugh v. State, 38 O. S., 153, 155;
McHugh v. State, 42 O. S., 154.

It further appears from the information voluntarily furnished by petitioner (Petition, p. 11) that in the twenty-two names of jurors drawn from the jury wheel there were five Catholics and one Negro. Except for the affidavit of petitioner there is no showing of the composition of the balance of the venire.

The question of deprivation of rights on the basis of racial or religious prejudice is not only upon this record a question that is not substantial but more than that it is one that has no foundation at all in the record. The question was not raised in the manner shown in the many cases cited by petitioner in his brief relative to the selection of jurors, which cases show in all instances that the question was raised either at the very inception of the case in challenging the array of grand jurors, or in examining and challenging jurors being impaneled at trial, or in challenging the array at the conclusion of the examination on **voir dire**, or in asserting the deprivation of constitutional rights throughout the proceedings had with respect to the trial.

This failure to do so is particularly controlling in this instance inasmuch as the petitioner had all of the information with reference to the jurors during the course of examination and before the jury was accepted and sworn, which acceptance by him was without reservation or exception (R., 210-211).

The Question of Bias and Prejudice.

We have heretofore commented upon the fact that the specifications of errors relate to matters determined against the petitioner by the Supreme Court of Ohio, which court affirmed the rulings of the trial judge upon those matters. The petition for a writ of certiorari cannot be converted into an error proceeding.

To claim that rulings of the Supreme Court of Ohio supporting the trial judge constitute evidence of bias and prejudice on the part of the trial judge is also to charge such bias and prejudice to the members of the

Supreme Court of Ohio who affirmed the action of the trial judge in making these rulings.

The Supreme Court of Ohio determined that the petitioner was accorded a fair and impartial trial, the court stating that:

> "It is our opinion that the jury had before it evidence which justified the jury in returning a verdict of guilty on the sixth count in the indictment. We are of the further opinion that it does not affirmatively appear from the record that the accused was prejudiced or prevented from having a fair trial" (R., 194).

As the facts of record are not sufficient to raise any substantial question of deprivation of any constitutional right of petitioner we do not undertake to present unnecessary argument, being fully convinced that upon this record the petition for a writ of certiorari should be denied.

Respectfully submitted,

STANLEY N. HUSTED,
Prosecuting Attorney of Clark County, Ohio.

SIMON L. LEIS,
Special Assistant Prosecuting Attorney.

HOMER C. CORRY,
STEWART L. TATUM,
Attorneys for Respondent, State of Ohio.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

JEROME A. NEVIUS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

The petitioner has moved the court for an order dispensing with the printing of the record for the stated reason that petitioner owns no property; has no savings or income, and is dependent upon his friends and relatives for the funds to appeal this cause. Respondent, in order to avoid further delay in the final determination of this case, files its brief in opposition to the petition for a writ of certiorari.

In doing this we make full reservation of our right, if the case is to be considered further by this court, to refute the grounds stated in the motion, which grounds are unsupported by affidavit, and the right to ask for the printing of the record at the cost of petitioner, or, if he

makes a showing in forma pauperis, then at the expense of the government.

Respectfully submitted,

STANLEY N. HUSTED,
Prosecuting Attorney of Clark County, Ohio.

SIMON L. LEIS,
Special Assistant Prosecuting Attorney.

HOMER C. CORRY,

STEWART L. TATUM,
Attorneys for Respondent, State of Ohio.

APPENDIX A.

Opinion of Trial Court on Motion for Arrest of Judgment and for a New Trial.

Davis, J.:

This matter is now before the court for disposition of two motions filed by the defendant, Jerome Nevius.

One is a motion in arrest of judgment, and the other a motion for a new trial.

The court can follow either of two courses in disposition of such matters. It can simply announce its ruling and sign the court order, or it can give a written opinion as part of its decision.

This case, and some matters involved in these motions are of such a nature that the court prefers to use a written decision.

Early in the summer of 1944 two actions were filed in this court seeking to recover money alleged to have been lost in a gambling place described as the Silver Dollar.

At that time this defendant, Jerome Nevius, was prosecuting attorney of Clark county, and as such an officer of this court, and one Niles Young was sheriff of Clark county, and also as such an officer of this court.

In these two civil suits, each of these officials were made defendants and charged with having an interest in this gambling establishment and permitting its operation in this county in which they were law enforcement officers.

This in substance amounted to a charge of corruption in public office against these two defendants.

A situation was thus created which, in the opinion of this court, required investigation as part of its official duties, and in justice to these public officials.

A court is not required to, and never does investigate such matters itself, but relies upon the proper officials and the use of a grand jury for such purpose.

Ordinarily the prosecuting attorney and the sheriff would be the proper officials to start and conduct such an investigation.

However, in this instance, these were the two officials who were made defendants in the civil actions and of course, it would be inconsistent to expect an official to investigate himself. It seemed desirable that such investigation be conducted by an out-of-town investigator, who would be free from the influence of politics, personalities or other things of a local nature.

The court, therefore, with the consent and approval of the board of county commissioners of this county, procured the service of Simon Leis of Cincinnati, Ohio, and appointed him for this purpose.

A grand jury was impaneled and sworn and the matter was then turned over to Mr. Leis and this grand jury, by the court.

As a result of this investigation and the evidence which was brought before the grand jury, indictments were returned by this grand jury against five persons, one of whom was this defendant, Mr. Nevius.

Thereafter some proceedings were had which pertain to judicial procedure and which have no bearing upon the matter now before the court as they have already been heard and disposed of in the usual course of procedure.

On the nineteenth day of June, 1945, this defendant, Jerome Nevius, was placed on trial before a jury in this court, having been granted a separate trial at his own request, from his two co-defendants, Joseph Parisi and Ralph Schear.

On July 7, 1945, the jury returned a verdict finding him guilty of all three of the offenses with which he was charged by the grand jury.

This court had no personal interest in the investigation and trial other than what any public official or citizen would naturally have. The acts which the court performed were judicial duties as required by law, and it was not necessary to form any opinion as to the guilt or innocence of any defendant. That was left entirely to the jury. However, since the grand jury brought these charges of bribery against this defendant and since the trial jury has declared by a unanimous verdict that they were convinced beyond a reasonable doubt of his guilt, their findings must be given the weight which the law says they shall receive.

The motion in arrest of judgment is based upon an allegation that the offense charged is not within the jurisdiction of the court.

In support of this motion two affidavits have been filed by a civil engineer and surveyor, in which he alleges that since this trial he has made further investigation and now finds that the Silver Dollar building is located in Greene county.

This affiant testified for the defense during the trial and could have given this additional testimony at that time if it had been available to him.

The defendant was discussing the county boundary line at this point with the county commissioners a year ago.

He was indicted by the grand jury more than six months before his trial. This additional evidence was available at all times and it would seem could have been found as easily during six months before trial as it has been in less than one month after the trial.

If a judgment is to be arrested or a case tried over for the reason that a witness states he can add to, qualify or change his former testimony, then many cases would obviously have to be tried more times.

Moreover, as convincingly argued by counsel for the state, if this defendant accepted bribes for permitting the "numbers" gambling to be operated all over the county without interference, it is not important or material where the headquarters of the gambling operations were located.

The motion in arrest of judgment is therefore overruled.

The motion for a new trial alleges all of the six causes or grounds specified in the statute. However, some of them were not argued or the attention of the court directed to them, so the court assumes they were not seriously considered by the defense and they will therefore be passed without comment.

The substance of this motion is that the defendant did not have a fair trial and his substantial rights were thereby materially affected.

Some affidavits by spectators have been filed to the effect that one of the jurors fell asleep while the trial was in progress. This claim is not an unusual occurrence. It

has happened in many trials and has occurred in former trials in this court. The decisions of other courts are practically all to the effect such an incident is not ground for a new trial, if the unsuccessful party having knowledge of it failed to call the attention of the court thereto and ask proper relief.

In this case the juror referred to was seated a few feet away from the defendant and his counsel and much closer to them than to counsel for the state or the judge.

It seems reasonable for this court to assume that anything unusual about this particular juror would have been observed by the defendant or one of his two counsel, a few feet away, as easily as by spectators in other parts of the court room.

The defense, of course, is under the same duties as counsel for the state or the judge in assisting in the procedure of a fair trial.

The theory of the decisions is that it is humanly impossible to prevent one or more of a group of persons from becoming drowsy under circumstances and conditions which tend to affect them in that way.

In this case an alternate or thirteenth juror was available in the event any of the regular jurors might become incapacitated.

The court is of the opinion therefore, that a new trial could not be granted upon this ground.

Only one more point which has been presented under this motion remains to be considered. It is raised by an affidavit filed by the defendant Jerome Nevius, himself, and alleges in substance that the members of the jury before which he was placed on trial, and a group of other persons who were summoned for jury service were

members of the Caucasian race, and not of the Catholic or Hebrew religious faith. No competent proof is offered in support of this allegation. The court does not know at this moment and never has known the racial lineage or religious faith of any members of this jury, or any other jury which has served in this court. Such matters are never inquired about by either the attorneys or the court in examining jurors, and in no jury trial in which Mr. Nevius took part has the court ever heard him make such an inquiry.

The reason such questions are never asked are well known. This is a country of racial and religious freedom and such things have no bearing upon the qualifications of jurors. The law simply provides that they shall be "judicious and discreet persons having the qualifications of electors of such county." If every minority race and each religious group must be represented upon a jury before it can be said a fair trial was had, it is doubtful if a jury of one hundred people would be large enough to meet the test. The fact that the attorneys in this case and the court have been unable to find even one case among all the reported cases in this country, in which the question of religion has been suggested in connection with a juror's qualifications, indicates how absurd and distasteful it is.

The court shares the opinion of people generally that religion is the sacred link between human beings and their God and not something to be dragged along the trail of a criminal trial. Such tactics become even more distressing when persons subject their own religion to such inconsideration.

But as already indicated, the basic question is: Did the defendant have a fair trial before a fair and impartial jury? Apparently the claim is not made that this jury was not fair and impartial. If such a charge were now made, it would not be consistent with the feelings expressed by the defense just before the jury was sworn, as shown by the following excerpt from the stenographic record.

"By the Court: Is there any further examination for cause at this time?

Mr. Corry: The state accepts the jury.

Mr. Herbert: The defense is satisfied with this jury.

By the Court: So that there will be no misunderstanding—the state passes any further examination for cause of any specific juror or the whole panel, and any additional peremptory challenge? And the defense passes any further examination of any specific juror for cause?

Mr. Herbert: Yes.

By the Court: And the defense accepts the jury, and passes the exercise of their remaining peremptory challenge?

Mr. Herbert: The defense is satisfied with the jury.

By the Court: Is there any reason known to either side why the jury as now seated should not be sworn in this case?

Mr. Herbert: No reason.

Mr. Corry: We have no reason.

Jury sworn."

If the defense now means to suggest that the members of this jury were not qualified to serve or were not mindful of their oath and duties, it is a base and unwarranted accusation. Or if they mean to suggest that members

of another racial lineage or religion would have disregarded evidence and law for the purpose of helping the defendant, even though he were proven guilty, it is an equally base accusation made without justification or respect.

The members of the grand jury which presented these charges against this defendant were under the same oath that is administered to all grand juries, and the evidence presented to them was by witnesses under oath.

The members of the trial jury which returned this verdict were under the same oath to faithfully and impartially perform their duties, as all trial juries are. They heard and saw all the evidence in the case as offered by witnesses who were also under oath, and after all the evidence had been presented to them they returned a unanimous verdict that the guilt of the defendant had been proved beyond a reasonable doubt.

Both the grand jury and the trial jury were instructed, in substance, as all juries are, that they must not allow any religious, political, social, or personal feelings or bias to affect or enter into their deliberations.

The court is firmly of the opinion that the defendant had a fair trial before a fair and impartial jury, and one which defense counsel stated they were satisfied with before the jury was sworn.

The motion for a new trial is also overruled.

There still remains to be considered the motion of the state to strike from the record the above mentioned affidavit of Jerome Nevius, together with the papers attached to it.

This motion is based upon several grounds, among them that it is in its nature scurrilous, incompetent and

irrelevant; also that the statements made therein are based upon hearsay, and several other grounds.

The papers attached to this affidavit consist principally of reports made by a credit bureau as to each of approximately one hundred people who had been summoned to report as jurors during the progress of this trial.

These reports undertake to cover not only the present status, but the past history of these prospective jurors. They express opinions of the credit bureau which are not made under oath and which on their face show that such opinions are based upon information given the credit bureau by so-called "informants" who are not disclosed, and who in turn have expressed their opinions to the credit bureau. These opinions purport to cover a wide field and pertain, among other things, to the condition of health, mental condition, personal habits, disposition and character, degree of intelligence, religion, race and descent, reputation for honesty, and credit and other matters pertaining to these prospective jurors.

The court feels that the filing of these papers amounts to an unwarranted intrusion into the private lives of other persons, and especially since it is of little or no value to the defense for the purposes of these motions.

If this practice were to be tolerated, and prospective jurors knew they were to be subjected to such investigations and reports, they would be fully justified in objecting to having their names deposited in the jury wheel by the jury commissioners.

These men and women were respected and representative citizens of this community. They were summoned

for jury duty in compliance with a court order and for which they were in no way responsible. To file as a permanent record in this court such a report as to each one individually is, in the opinion of the court, an act of the most inexcusable and contemptible character, and one which they have every right to resent. This court is surprised that reputable attorneys would permit such a thing in a case in which they were counsel.

The motion of the state to strike from the record this affidavit and the attached reports is sustained upon all the grounds stated in the motion, as to the reports and papers attached to the affidavit. However, the court will allow the affidavit itself to remain, so that in the event of review by another court, it will be before the reviewing court.

The court does sua sponte, or of its own motion, also strike from the record the affidavit made by Elmer Ayres and filed in this case by the defense.

Both of these motions are therefore overruled, and counsel for the state may prepare and submit the proper entry.